

Message Text

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FM SECSTATE WASHDC

TO AMEMBASSY MANILA

C O N F I D E N T I A L STATE 001788

E.O. 11652: GDS

TAGS: EGEN, RP

SUBJECT: AER TREATY AND AMCHAM CONCERNS

REF: MANILA 13701

1. DEPARTMENT HAS EXAMINED AMCHAM PAPER ON LAUREL-LANGLEY EXPIRATION PROBLEMS, PRESENTED TO DEPARTMENT BY HENRY DURING DECEMBER. AS PREVIOUSLY INDICATED (E.G. STATE 197661), WE AGREE IT IS ESSENTIAL TO MAINTAIN DIALOGUE WITH U.S. BUSINESS COMMUNITY IN PHILIPPINES (AND HERE) BUT IT IS IMPORTANT THAT DISCUSSIONS BE KEPT ON SUFFICIENTLY GENERAL LEVEL SO THAT WE DO NOT CONTRIBUTE TO UNWARRANTED EXPECTATIONS ON THE PART OF U.S. BUSINESSMEN AS TO WHAT AN AGREEMENT COULD INCLUDE OR ACCOMPLISH, AND THAT WE DO NOT BECOME SO INVOLVED IN DETAILED DISCUSSIONS WITH
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BUSINESS REPRESENTATIVES THAT THEY BEGIN TO FEEL USG IS

COMMITTED TO SPECIFIC LANGUAGE. FOLLOWING COMMENTS ARE OFFERED, THEREFORE, FOR EMBASSY'S INFORMATION; AND AS BASIS FOR DISCUSSION WITH BUSINESS COMMUNITY REPS.

2. WE BELIEVE MOST OF AMCHAM'S CONCERNS REGARDING AMERICAN BUSINESS INTERESTS ARE ADEQUATELY COVERED IN OUR DRAFT, ALTHOUGH SOME OF THE POINTS RAISED DO NOT APPEAR

SUSCEPTIBLE TO HANDLING IN A TREATY. OUR COMMENTS ON SPECIFIC ITEMS ARE AS FOLLOWS:

A. RETAIL TRADE - AS DRAFTED PROPOSED AER TREATY CONTAINS NO EXCEPTION ALLOWING DEPARTURE FROM NATIONAL TREATMENT IN RETAIL TRADE FIELD. WE EXPECT, OF COURSE, THAT GOP WILL PROPOSE SUCH AN EXCEPTION, AND WOULD CONSIDER WITH INTEREST ANY PROPOSAL WHICH AMCHAM WISHES TO PROVIDE REGARDING AN APPROPRIATE DEFINITION.

B. MINORITY REPRESENTATION - A PROVISION IN A TREATY GUARANTEEING RIGHT TO PROPORTIONATE REPRESENTATION IN MANAGEMENT OF ENTERPRISES WOULD NOT BE APPROPRIATE, IN VIEW OF WIDELY VARYING STATE LAWS IN U.S. IT SHOULD BE NOTED, HOWEVER, THAT DRAFT AER DOES PROTECT CONTRACTUAL RIGHTS (PARA IV:1) AND PROPERTY (PARA IV:2), AND THUS SHOULD PROVIDE BASIS FOR AGREEMENTS REGARDING PARTICIPATION IN MANAGEMENT OF ENTERPRISES FOR MINORITY INTERESTS. MOREOVER, AS EMBASSY NOTES THERE APPEAR TO BE NO RESTRICTIONS ON SUCH MINORITY REPRESENTATION IN PHILIPPINE LAW AND CONSTITUTION.

C. LAND OWNERSHIP - ARTICLE VI OF TREATY IS DESIGNED TO PROTECT OWNERSHIP OF LANDS HELD ON DATE OF ENTRY INTO FORCE OF TREATY. WE ARE DOUBTFUL THAT GOP WILL AGREE TO THIS FORMULATION, AT LEAST IN TREATY, BUT HOPE THROUGH THIS DRAFT PROVISION TO APPROACH MUTUALLY ACCEPTABLE SOLUTION TO LAND TITLE QUESTION.

D. LAND LEASES - ARTICLE VI:1 ASSURES NATIONAL TREATMENT WITH RESPECT TO LEASING PROPERTY. ARTICLE

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IV:1, WHICH PROTECTS LAWFUL CONTRACT RIGHTS, MAY ALSO BE OF ASSISTANCE IN CONNECTION WITH RIGHT-TO-LEASE PROVISIONS.

E. VISAS - ARTICLE I:1 OF DRAFT TREATY FOLLOWS LANGUAGE OF EXCHANGE OF NOTES OF SEPTEMBER 6, 1955, ON TREATY INVESTORS AND TREATY TRADERS ON ENTRY OF PERSONS. NO DECISION HAS BEEN MADE TO REQUEST TERMINA-

TION OF THIS EXCHANGE OF NOTES.

F. NEW LIMITATIONS - ARTICLE V IS DESIGNED TO PROTECT EXISTING ENTERPRISES AGAINST NEW LIMITATIONS WHICH MIGHT HAVE THE EFFECT OF RESTRICTING RIGHTS TO ENGAGE IN BUSINESS ACTIVITIES ON OTHER THAN A NATIONAL TREATMENT BASIS. WE ARE NOT, HOWEVER, REQUESTING BETTER THAN NATIONAL TREATMENT IN THIS REGARD.

3. FOLLOWING FOR EMBASSY'S INFORMATION ARE COMMENTS IN RESPONSE TO QUESTIONS RAISED PARA 5 REFTEL:

A. WORD "CONTROLLED" IN PARAS V:4 AND V:5 DRAFT AER IS BROADER THAN WORD "OWNED". LATTER WORD IMPLIES MORE THAN 50 PER CENT OWNERSHIP. "CONTROLLED" INCLUDES CONCEPT OF OWNERSHIP, IN ABSENCE OF SPECIAL CONTRACTUAL PROVISIONS WHICH MIGHT IMPAIR EFFECTIVE CONTROL OF MAJORITY OWNER, BUT ALSO INCLUDES SITUATION WHERE DESPITE LESS THAN MAJORITY OWNERSHIP, AN INTEREST IS EFFECTIVELY IN CONTROL OF THE MANAGEMENT OF THE COMPANY OR ENTERPRISE. IN THE CASE OF A LARGE PUBLICLY HELD CORPORATION, AS LITTLE AS 15 PER CENT OWNERSHIP MAY CARRY EFFECTIVE CONTROL. OBVIOUSLY, NO SINGLE PERCENTAGE CAN BE FIXED AS INDICATIVE OF "CONTROL"; A 49 PERCENT INTEREST WOULD NOT AMOUNT TO CONTROL IN THE FACE OF A 51 PER CENT INTEREST OWNED BY A SINGLE PHILIPPINE NATIONAL AND UNENCUMBERED BY SPECIAL CONTRACTUAL ARRANGEMENTS PRESERVING MANAGEMENT RIGHTS FOR THE MINORITY OWNER.

PARA V:5 IS DESIGNED TO PROTECT AGAINST ARBITRARY CHANGES IN LAWS WHICH WOULD HAVE THE EFFECT OF DEPRIVING NATIONALS AND COMPANIES OF THE BENEFITS OF PROPERTY OWNERSHIP THROUGH MEANS OTHER THAN EXPROPRIATION; IT

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THUS SUPPLEMENTS THE GUARANTEES CONTAINED IN PARA IV:2. IT IS NOT A GUARANTEE AGAINST EXPROPRIATION, NOR IS IT A GUARANTEE THAT NORMAL CHANGES IN MANAGEMENT WILL NOT OCCUR.

B. WORDS "NEW LIMITATION" CONTAINED IN PARA V:2 SHOULD BE INTERPRETED AS REFERRING TO ALL RESTRICTIONS NOT PRESENTLY APPLIED TO AMERICAN COMPANIES. THIS PROVISION WOULD THUS CONTINUE THE PROTECTIONS CONTAINED IN LAUREL-LANGLEY, ART. VII.

C. EMBASSY IS CORRECT THAT, EXCEPT AS QUALIFIED IN PARA V:2, U.S. NATIONALS WOULD BE ENTITLED TO NATIONAL TREATMENT REGARDING INVESTMENT IN PHILIPPINES.

D. PARA I:3 (B) DOES NOT REPEAT NOT COVER THIRD
COUNTRY NATIONALS, BUT ONLY PERSONS EMPLOYED BY COMPANIES
"OF SAME NATIONALITY" (AS THEIR OWN). KISSINGER

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